UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY,
Employer,

Case 13-RC-121359

and

COLLEGE ATHLETE PLAYERS
ASSOCIATION (CAPA),
Petitioner.

AMICUS CURIAE BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION

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INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense and Education Foundation ("Foundation") is a non-profit, charitable organization that provides free legal assistance to individuals who, as a consequence of compulsory unionism, have suffered violations of their right to work; their freedoms of association, speech, and religion; their right to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the several states.

Attorneys provided by the Foundation have represented numerous individuals before the National Labor Relations Board ("NLRB" or "Board") and in the courts, including representation in such landmark cases as *Harris v. Quinn*, ___ U.S. ____ No. 11-681, slip op. (June 30, 2014); *Knox v. SEIU*, 132 S. Ct. 2277 (2012); *Davenport v. Washington Education Ass'n*, 551 U.S. 177 (2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In hundreds of other cases throughout the country, the Foundation is aiding individuals who seek to limit their forced association with, and their financial payments to, unions.

The Foundation, which has a long-standing interest in protecting the rights of students and the academy from forced unionism, filed an *amicus curiae* brief in *Brown University*, 342 NLRB 483 (2004) and *New York University & GSOC/UAW*, Case No. 02-RC-023481.

Amicus Foundation believes anytime individuals are forced to join, be represented by or support a labor union, compulsion impacts upon their constitutional rights. That impingement is especially harmful to student athletes since they are not employees. In light of the above, the

Foundation submits this brief to highlight the adverse impact that certifying labor unions as exclusive bargaining agents of student athletes will have upon these students.

ARGUMENT

I. If Student Athletes Are Unionized, the Imposition of Compulsory Fees Would Be Unconstitutional

In the United States, academic freedom is generally respected, and the courts have accorded it special legal protections. The U.S. Supreme Court has held that academic freedom is a "special concern of the First Amendment." *Keyishian v. Bd. of Regents,* 385 U.S. 589, 603 (1967). Out of respect for academic freedom, the Court has urged judicial restraint when dealing with universities. *Board of Curators v. Horowitz,* 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring); *see id.* at 90-92, (opinion of the Court). Just as the courts show deference and a reluctance to interfere in university settings when there is a risk of treading on academic freedom, so too should the Board show similar deference to and restraint toward student athletes. Using state power to impose an exclusive bargaining agent on students is an unwarranted intrusion into academia. As a matter of public policy and out of respect for academic freedom, the Board should refrain from such impositions.

In addition to the consideration the Board must give to academic freedom, it must also weigh the negative impact exclusive bargaining will have on students' rights of free speech and free association. The imposition of exclusivity will impact their First Amendment rights in a manner that may well not withstand constitutional scrutiny. The National Labor Relations Act ("Act" or "NLRA") "exclusive representation" regime is rooted in state action. Absent a governmental grant of monopoly bargaining power to a union as an exclusive bargaining agent, students are free to enter into their own contracts with universities. It is only the power of

government that takes that liberty from students.

Moreover, compelled negotiation and enforcement of any agreement between a union and a private university is administered by the NLRB. This governmental involvement is "state action," to which the Constitution applies. *Railway Clerks v. Hanson*, 351 U.S. 225, 232 & n.4 (1956). *Beck v. Commc'ns Workers*, 776 F.2d 1187, 1205-09 (1985), *aff'd en banc on other grounds*, 800 F.2d 1280 (4th Cir. 1986), *aff'd*, 487 U.S. 735 (1988);[1] *Seay v. McDonnell-Douglas Corp.*, 427 F.2d 996, 1002-04 (9th Cir. 1970); *Linscott v. Millers Falls Co.*, 440 F.2d 14, 16-18 (1st Cir. 1971) ("'the federal statute is the source of the power and authority by which any private rights are lost or sacrificed,'" citing *Hanson*, 351 U.S. at 232); *see Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1420 (D.C. Cir. 1997) ("'it is not apparent why it is any less state action'" under the NLRA than under the Railway Relations Act), *criticizing Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983); *Wegscheid v. Local Union 2991, UAW*, 117 F.3d 986, 987-98 (7th Cir. 1997); *but see Price v. Int'l Union, UAW*, 927 F.2d 88, 91-92 (2d Cir. 1991); *Kolinske,* 712 F.2d at 474.

Because there is state action involved in the grant of exclusivity and the administration of relations between the employees, union and employer, the First Amendment rights of students are implicated. *See Thomas v. Collins*, 323 U.S. 516, 532 (1945).

The imposition of a union as an exclusive collective bargaining agent alone implicates these First Amendment considerations. Once the Board mandates exclusive representation, compulsory union dues and fees will follow. The Supreme Court has held that requiring employees to pay *any* union dues or agency fees as a condition of employment is "a significant impingement on First Amendment rights." *Ellis*, 466 U.S. at 455. The principle underlying the Supreme Court's decisions in compelled speech cases is that, just as the First Amendment protects the right of

[1]The Supreme Court did not rule on the "state action" issue in *Beck*, 487 U.S. at 761.

freedom of speech and association, it also protects the right to refrain from compelled speech and association. *Keller v. State Bar*, 496 U.S. 1 (1990) (state cannot require payment of bar dues used for political and ideological purposes); *Abood,* 431 U.S. at 234-35 (state cannot require payment of agency fees for purposes other than collective bargaining, contract administration and grievance adjustment); *Wooley v. Maynard*, 430 U.S. 705, 713-15 (1977) (state cannot require citizens to have a state motto on automobile license plate); and *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (state cannot require salute to the flag).

The Supreme Court has held "the agency shop itself impinges on the nonunion employees' First Amendment interests." *Hudson*, 475 U.S. at 309. More recently, the Court has all but abandoned the rationale that justifies compulsory unionism. First, the Supreme Court made it clear that exacting scrutiny is required when compulsory unionism is imposed. *Knox*, 132 S. Ct. at 2289-90. Now in *Harris v. Quinn*, the Court acknowledged its cases justifying the imposition of fees were wrongly decided.

In *Harris*, the Supreme Court ruled there was no compelling interest in forcing non-member quasi-employees to pay a so-called "agency fee" to a collective bargaining representative. *Id.*, slip op. at 29-34. *Harris* addressed the unionization of in-home healthcare workers who are hired by disabled individuals and paid through state Medicaid payments. The disabled individuals control all aspects of the employment relationship. *Id.* slip op. at 2. Illinois certified the SEIU as the exclusive bargaining representative of in-home healthcare workers and the union and Illinois entered into a collective bargaining agreement requiring such workers who were not union members to pay union dues. *Id.*, slip op. at 6. A group of providers challenged as unconstitutional the imposition of so called "agency fees." The Supreme Court thus considered whether *Abood* "applies not just to full-fledged . . . employees, but to others who are deemed to be

. . . employees solely for the purpose of unionization and the collection of an agency fee." *Id.*, slip op. at 9. The Court ruled imposition of an agency fee was unconstitutional because the in-home care providers were not fully-fledged employees of the State. The Court found "*Abood*'s rationale, whatever its strengths and weaknesses, is based on the assumption that the union possesses the full scope of powers and duties generally available under American labor law . . . . [here] however, the union's powers and duties are sharply circumscribed, and as a result, even the best argument for the "extraordinary power" that *Abood* allows a union to wield is a poor fit" *Id.*, slip op. at 25.

Here, the football players are also not employees and cannot be required to pay compulsory dues to the Union. Just like the personal assistants in *Harris*, the football players do not fit into traditional employee-employer relationships. Furthermore, like in *Harris*, the Union's collective bargaining is circumscribed by the fact it cannot negotiate over many traditional terms and conditions of employment because they either (A) do not exist, or (B) are not within Northwestern' s control. For example, mandatory subjects of bargaining would likely include the number of scholarships, the amount of time spent practicing during the week, and additional monetary benefits. However, many of these subjects are constrained by the University's membership in the NCAA and Big Ten Conference. Like the personal assistance in *Harris*, many subjects of collective bargaining are "out of bounds." *Id.*, slip op. at 23-4. Subsequently, should the Board find a union can be formed here, it should limit any attempt by the Union to collect dues from non-member football players.[2]

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2 Nor can the constitutionality of compulsory payments be saved by the fact the Board declares the football players are actually employees. The Supreme Court noted in determining whether compulsory payments are constitutional, "[w]hat is significant is not the label the State assigns . . . but the substance of their relationship . . . ." *Harris*, slip op. at 23 n.10. The substance of the relationship between Northwestern and the football players is educator and student, not employer and employee.

The NLRB's own record of not treating students as employees shows students fall outside the industrial-labor model government uses to justify exclusivity and compulsory unionism. The NLRB may claim that the government's interests in this academic setting are identical to that which permits compelled speech for collective bargaining in industrial settings. Given the countervailing interests of academic freedom in a university setting and the limited economic interests involved in students receiving compensation, no compelling interest justifies an infringement on the students' First Amendment rights. In light of *Harris*, any warrant the Board may once have had to justify infringing on the academic freedom of universities and the right of free speech of their students no longer has viability.

II. Classifying Scholarships as Compensation Received for the Benefit of the Employer Creates a Slippery Slope, Allowing Unionization of Many More Students

College football's roots go back over 100 years when teams from Princeton and Rutgers met in New Brunswick, New Jersey, for the first intercollegiate football game.[3] Since then, college football has become an integral aspect of American life, loved as a sport by students, alumni, and fans. Furthermore, its athletes are not only honored for their physical skills but also recognized as scholars. The fact that students play football for the love of the game is demonstrated by the fact that college football attracts not only students who wish to obtain a scholarship, but also walk-ons.

The Regional Director's decision flips college football from a game played within the context of a university environment into a business. The decision to classify these football players as employees is premised, in part, on the argument that the football team creates an economic benefit for the University and the scholarships are compensation for that benefit.

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3 http://www.collegesportsscholarships.com/history-ncaa-football.htm.

Admittedly, the football program creates an economic benefit for the University. However, when determining the definition of employment, profit motive is irrelevant. The Board does not consider the profitability of an employer in determining whether its "employees" are covered by the Act. An employer that loses money is no less subject to the Act than one that makes money. Universities typically have other athletic programs that are unprofitable, yet scholarships are still given to the students who compete for the university. In these instances, the Board could claim scholarships are compensation for a benefit received, and yet, the university may lose money on the sport.

Furthermore, applying the economic benefit theory, any college student participating in an extra-curricular activity could be subject to the Act. For example, take a student orchestra. Suppose the university orchestra makes a profit playing concerts or making public appearances. Universities often give scholarships for promising high school musicians to join the orchestra. Under the Regional Director's decision, the orchestra members would be providing a benefit to the university in exchange for their scholarship and could consequently be unionized. A similar result could occur for students who receive scholarships for participation in a university's theater program. Likewise, students on scholarship conducting research in science, technology, engineering, or medicine on behalf of a corporate, foundation, or government grant could generate a profit for the university and be subject to unionization. Accordingly, the Regional Director's decision would open the flood gates to any program offering scholarships to students whose contributions produce an economic benefit for the university. The practical results could be the elimination of many scholarships.

Finally, the Regional Director's certification could lead to other, perhaps even more absurd, classifications of employees. For example, if a non-profit generates income by touting its

social services, is the recipient of those services also an employee? This would be a step that could lead to the reversal of the Board's decision in *Goodwill Industries,* 304 NLRB 767 (1991). The unintended consequence could be the elimination of many charitable programs.

III. Student Athletes Are Not Employees Under the Act

A. The definition of "employee"

The NLRA's definition of employee is simple: "the term 'employee' shall include any employee." 29 U.S.C. §152 (3). That definition is so bare bones it implicitly presumes any reasonable person applying common sense will understand what constitutes an employee. No common-sense application of that definition dictates student athletes on scholarship are employees.

Although the legislative history is silent on the issue, it is safe to assume Congress did not consider students who receive scholarships as statutory employees. It is highly unlikely anyone in Congress thought college athletes were employees during the passage of the Act.

The Regional Director adopted the common law definition of employee states: "a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment." *NLRB v. Town & Country Elec.*, 516 U.S. 85, 94 (1995). The Director, however, gives absurd applications to the common law criteria. Instead of using a common sense understanding, the decision creates a bizarre meaning of employee.

B. College football players do not play football to earn an income

To understand whether football players are employees, it is helpful to consider the reason behind their relationship with the University. Student athletes are students first and athletes second. They are in college principally to receive an education, not to earn a living. Furthermore, college football is not primarily a stepping ground to prepare for a professional career in the

National Football League ("NFL").[4] The individual students are chiefly playing for fun, love of the game, or as an opportunity to attend college. The sport teaches character and life-skills that will serve them well past graduation. Consequently, the players understand their scholarships are earmarked for tuition and not a grant of disposable income that can be used to buy a car or go on vacation. While the requirements of the player's positions may be intense, the primary reward for their efforts is a college degree and not income.

According to the Regional Director, the "scholarship" is the form of the football player's compensation. However, there is no monetary transfer directly to the player (other than a housing stipend in lieu of dorm fees). Instead, the student athletes receive a scholarship for their education. They clearly are not earning money or receiving compensation. If players were earning money, they could decide what to do with it. They have no choice as to the use of the scholarships. No employer-employee relationship results in the employee being forced to spend every dime of his compensation for services from the employer. The situation here is unique because students are not employees and scholarships are not compensation.

It defies common sense an employment contract would not include monetary payment. Even the Regional Director admits "players do not receive a paycheck in the traditional sense." In order to conform to the traditional meaning of the Act and to avoid absurd scenarios, common sense dictates that compensation be in the form of a "paycheck in the traditional sense."

In addressing scholarships as compensation, the Regional Director argues since scholarships are revocable under certain circumstances, they are compensation for work done. The

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4 This is especially true of players from Northwestern. Over the past four years, only two players have been drafted from Northwestern into the NFL, both in the 2012 draft. 2012 NFL Draft Tracker, http://www.nfl.com/draft/2012/tracker#dt-tabs:dt-by-college/dt-by-college-input:36 (last visited July 3, 2014).

situations in which scholarships are revocable prove why scholarships are not "pay for play." Scholarships are *not* revocable if a student is unable to compete due to lack of skill or injury. If the scholarship were payment for playing football, Northwestern would likely be pulling scholarships regularly for underperforming players. Instead, the scholarships are revocable for reasons of misconduct off the field and academic failure. That is because the football players are students first.

The Regional Director's decision is also contrary to the IRS's position that scholarships are not taxable income. While the Board held it does not defer to the IRS's definition of employee, *Seattle Opera v. NLRB*, 292 F.3d 737 (D.C. Cir. 2002), this case is clearly distinguishable. In Board cases holding the IRS determination of taxes was not dispositive, employers were attempting to avoid classifying workers as employees by turning them into independent contractors. Since the employers did not deduct taxes from the wages of the independent contractors, they argued the individuals were not employees. In those cases, the argument turned on who was responsible for the deductions, not whether the individual owed taxes. In this case, the IRS has ruled scholarships are not taxable. Similarly, other federal agencies that regulate employer-employee situations, such as the Department of Labor, do not consider scholarships a subject of wage and hour regulations.

C. *University control over the football players is not evidence that they are employees*

Beyond compensation, the Regional Director states an indicia of employment is the control the University exercises over the football players. Admittedly a university does have widespread control over its college athletes, but control over students is not unusual in the academic context. In fact, it is quite similar to the type of control many colleges and universities have exercised: "*in loco*

parentis." While that control is comparable to how schools have at times "controlled" students, there are no common examples where employers exercise comparable "control" over employees' private lives. If anything, the "control" exhibited by the University is evidence that the students are not employees, but students engaged in an extra-curricular activity.

The Regional Director cites two examples where a football player's scholarship was cancelled due to violations of the University's rules that exhibit "employer" control. One involved a player's use of a BB-gun in a dormitory and the other where a player violated the University's alcohol and drug policy. Both of those examples, however, illustrate why football players are not employees. First, neither involves the student's performance on the field. Second, employers rarely care about, much less control, conduct that occurs off work premises. It is hard to imagine an employee being fired for shooting a BB-gun in his home. Third, universities often discipline students for personal misconduct either on or off campus; this is especially true for drug and alcohol offenses. University discipline does not transform students into employees.

The Regional Director argues that student football players are not primarily students because of their time commitment to football. Such commitment, however, is not unique on a university campus. Students engage in a host of activities that take up large amounts of time—music, theater, student government, or ideological activism. Second, time commitment is not a consistently applied indicia. In a contradiction, the Regional Director would exclude walk-on football players from the bargaining unit, yet walk-on players also spend an enormous amount of time in the sport (if not more due to their perceived lack of skill versus scholarship players).

D. The Letter of Intent and "tender" are not evidence that the football players are employees

The Regional Director claims another indicia of an employer-employee relationship is the

National Letter of Intent ("NLI") and "tender." He claims that college football players, by accepting a tender, have an employment contract. What are the terms of this tender? First a NLI is not required for a student to obtain a scholarship. The NCAA website states: the NLI seeks to limit recruiting pressure but signing one is not a required step to earning an athletic scholarship.[5] Second, even the Regional Director admits that while the University is bound by a NLI, the student can void it.

In many ways, the NLI and tender are no different than from other scholarships where there is a quid-pro-quo. For instance, many academic scholarships require the maintenance of a specific GPA to keep the scholarship, or where students have deadlines to accept admission to a particular institution.

E. The Board's own precedent supports the fact that football players are not employees

The Regional Director's decision finds no basis in established Board law. *First*, any monetary compensation student athletes receive—whether in the form of stipends, financial aid, grants or hourly pay—is incidental to any educational purpose. For approximately 50 years, the Board did not recognize any students as employees under the Act. *Cedars-Sinai Med. Ctr.*, 223 NLRB 251 (1976); *St. Clare's Hosp. & Health Ctr.*, 229 NLRB 1000 (1977). Not until the late 1990s, approximately 50 years after enactment of the Act, did the Board "discover" that graduate students were "employees." Out of the blue, with no change to the law or the nature of a university, the Board reversed course. *Boston Med. Ctr. Corp.,* 330 NLRB 152 (1999); *New York Univ.*, 332 NLRB 1205 (2000) (*"NYU I"*). In changing course, the Board failed to recognize not only that a university is a unique employer, but it does not fit the model of an industrial factory.

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5 http://www.ncaa.org/about/resources/media-center/national-letter-intent

Four years later, in 2004, the Board decided *Brown*, which reversed its holding in *NYU I,* to recognize graduate students are students, not employees. In overturning *NYU I,* the Board denied certification to the United Auto Workers as the exclusive bargaining agent of Brown University teaching assistants. The Board's holding in *Brown* is a correct reading of the NLRA. Students are not statutory employees; that is true whether students are graduate students, teaching assistants, concert orchestra performers, actors, or yes, even football players.

Furthermore, the industrial model upon which the NLRA is based is an inappropriate model to impose on a university, as regards its compensated students. The Supreme Court limited the Board's power to force university professors into labor unions because "principles developed for use in the industrial setting cannot be imposed blindly on the academic world." *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680-81 (1980). It would constitute serious error for the Board to impose an industrial labor model on college athletes on what is essentially a student-university relationship.

If the Board should conclude football players are employees, they should apply its precedents for temporary employees to student athletes, and not permit certification of the student-athlete union at Northwestern. Football players will be members in the bargaining unit for only 4 years, with an approximate 25% turn over of "employees" each year. In all likelihood, any union that represents them as the exclusive bargaining agent will represent, first and foremost, its own institutional interests over that of the students. As a practical matter, the student athletes are not going to be members of the bargaining unit long enough to truly exercise any democratic control over the union. *See Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127 (1971); *St. Thomas-St. John Cable TV*, 309 NLRB 712 (1992) (temporary employees not included in bargaining units). The Board's approach to temporary employees is a less inappropriate model for

student athletes than treating them as identical to long-term employees.

Furthermore, recognition that college football players on scholarship do not "work" at universities principally for monetary remuneration is consistent with the Board's holding in *Goodwill Industries,* 304 NLRB 767 (1991). There, the Board ruled that employees of Goodwill are not employees for purposes of the Act when the primary purpose of their work is rehabilitation rather than earning a living.

IV. The Impact of Unionization of Student Athletes at Northwestern

If the football players organize, compulsory unionism may be imposed by a collective-bargaining agreement. While compulsory unionization is significant for all employees, it is particularly sensitive in the university setting. Student unionization and compulsory bargaining interferes with the students' academic freedom, as well as their First Amendment rights of freedom of speech and association. NCAA rules severely limit the terms of scholarships that can be paid to student athletes. For example, universities are not permitted to offer an unlimited number of scholarships or provide financial incentives beyond tuition, room and board, and books. If the Northwestern players are unionized, their ability to negotiate any contract consistent with those rules will be impossible. The Board has no power to compel the NCAA to change its rules and the NCAA will have no incentive to change its rules. No public schools—including 13 of the 14 members of the Big 10 Football conference—can be unionized under the NLRA, and few if any states will permit their public schools to have student athlete unions. The result will be that Northwestern will not be able to play other NCAA teams and therefore unlikely to even field a team.

Arguably the Board could limit the scope of the student athlete union's bargaining power to conform with NCAA rules. However, there is no statutory basis for such a limitation and it

would be an implicit admission by the Board that student athletes do not fall into the traditional industrial unionization model. Furthermore, if the bargaining were so restricted to make it consistent with NCAA rules, bargaining would become virtually meaningless. Presumably the University could avoid the demise of the program by eliminating all scholarships for football players. That would, however, also end the unionization of the program since the play for pay rationale would no longer exist. No longer would underprivileged talented athletes have an opportunity to get a first class college degree unless they were otherwise eligible for an academic scholarship. The net result would be eliminating an escape from the cycle of poverty for many young men. The practical effect on a less competitive program would be devastating. If Northwestern football no longer generated large amounts of money, it would level a death blow to other sports relying on football profits to subsidize their programs. Particularly hard hit would be women's programs that exist under Title IX due to the profitability of college football at Northwestern. Limitations on the number of football scholarships was instituted in 1973 in order that money would be available for women's sports in accord with Title IX. In short, the (presumably) unintended consequence of the unionization of Northwestern football would have its chief negative impact on the underprivileged, minorities, and women.

V. The Board Should Not Overturn *Brown*

If, *arguendo*, the Board considers these college football players to be employees, it should not apply that same standard to graduate students. Graduate students have a different set of unique conditions. For example, grants and awards paid to graduate students vary from department to department, and student to student. One of the most egregious abuses of exclusive representation is the leveling down of the best in favor of the group. In the industrial model labor unions use in collective bargaining, employees are fungible, receiving the same wages adjusted for seniority. As

a result, the most productive workers receive the same wages as the least productive. This has a particularly negative impact on graduate students both for non-economic and economic reasons. Non-economically, it is inappropriate to treat teaching assistants and other graduate students as employees because some part of their "compensation" typically is in the form of academic credit, which is an intangible. Grading is associated with such credit. If monetary compensation for teaching assistants were treated as employee wages under the Act, it is a short and natural step for grades received as part of the academic credit to be treated as a form of compensation subject to collective bargaining. In that instance, bargaining over grades would become a mandatory subject of bargaining. It would be consistent with labor union philosophy to demand all graduate students receive grades within a narrow range, or even the same grades, for credits received as teaching assistants. The negative impact this would have upon the academic community is palpable.

The problems with why unionization of graduate students is in many ways more significant than unionization of athletes is that not all graduate students do the same type of work with the same source of funding. Beyond their status as students, each graduate student is different. What type of employment and compensation they might receive varies.

First, the Board must address the problem of graduate students who receive external grants. No legal justification exists to corral into a bargaining unit students who receive external grants from the government, foundations or other third party sources with graduate students whose income is derived from university sources. Under no conceivable theory can externally funded students properly be classified as statutory employees. Research assistant salaries generally are underwritten by independent third parties for specific research projects. Their rates of pay are usually set by the grantor, with whom a union cannot bargain. It would be harmful to both the students and the mission of the university to permit a union to use those grants as bargaining chips

in university negotiations over other students' rates of pay. Universities and graduate students typically receive foundation and corporation grants earmarked for the hiring of teaching assistants and other graduate students to perform specific duties. Forcing universities to bargain with labor unions over the wages and working conditions of graduate students has the potential to adversely affect the award of such grants. As discussed above, the typical behavior of labor unions is to bargain for equal salaries. Once the exclusive bargaining agent demands all "wages" either be raised to the same level as those whose teaching and research is paid for by such grants or, alternatively and more likely, be leveled downward, foundation and corporation incentives to provide those grants will diminish. Furthermore, most grant money already has the economic stipend set as part of the grant, thus eliminating the union's purported purpose for representation.

Regarding students who hold temporary university jobs, they work on an hourly basis often doing administrative work. Clearly they are not statutory employees who share the same community of interest as student teaching assistants or students who receive federal grants. In fact, they may fall into in a different bargaining unit – such as a clerical employees' unit.

Additionally, what happens when a professor, with university funds, pays a graduate student to perform a certain discrete task to aid the professor's research? Each such situation would involve unique circumstances, skills, and time-frames, none of which fits within the framework of "collective bargaining." Another problem arises if some "bargaining unit" students receive non-need based grants from a university. A union could charge that the university was violating the contract by giving bargaining unit employee compensation outside of the collective bargaining agreement.

If one totals all of the exceptions the Board would have to carve out of a unit of graduate students—third-party funded students, teaching students already in another unit, clerical

employees with different interests from teaching students, students working for one professor on a project, students who receive grants or scholarships—it is clear that even should the law permit the Board to label graduate students as statutory employees, the Board would have to exercise its discretion and not do so due to of all the problems it would create. Finally, and perhaps most significantly since many graduate students teach, the impact on academic freedom and free speech as discussed above would be magnified in the case of graduate assistants.

CONCLUSION

While some unions may have Marxist dreams that students are "workers" (as opposed to students), who will be in the vanguard of an economic revolution when the workers of the world unite, the fact remains that students *are* principally students, with little commonality of interest with most "employees." *Amicus* suggests that the radical changes that could flow from certification of the petitioning Union as the exclusive bargaining agent are so far removed from traditional labor relations that the courts would almost certainly strike it down, while in the interim, destroying college sports at Northwestern and elsewhere. The Board should consider whether, as a matter of public policy, forcing students to be represented by an exclusive bargaining agent serves the Act's purposes and the larger societal interests implicated by such an intrusion into academia. As John Miller stated in *The Big Scrum*, "There was a moment when football was almost taken away from us, a time when a collection of Progressive Era prohibitionists tried to ban the sport."[6] It was at this time that Teddy Roosevelt saved college football. Once again, it is in danger of being taken away. For the above-stated reasons, the Board should reverse the Regional Director and deny the Union's petition.

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[6]John Miller, *The Big Scrum* (Harper Collins 2011), p. xi.

Respectfully submitted,

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Dated: July 3, 2014

CERTIFICATE OF SERVICE

This is to certify that on July 3, 2014, a copy of the *Amicus Curiae* Brief of the National Right to Work Legal Defense and Education Foundation was filed electronically with the National Labor Relations Board, and copies were deposited in the U.S. mail with the proper postage affixed thereto to the parties below:

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